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In the

Supreme Court of the United States

October Term, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellants,

-vs.-

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees,

On Appeal from a Three Judge Court of the United States District Court for the Eastern District of Pennsylvania

BRIEF AMICUS CURIAE OF THE FAMILY LIFE PROJECT OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING APPELLANTS

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QUESTION PRESENTED

In the view of the Family Life Project of the American Center for Law and Justice, the question is:

> Does Congress' adoption of the indecency standard — for regulation of indecent computer communications to children — survive facial constitutional challenge under the First Amendment?

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INTEREST OF THE AMICUS CURIAE*

The American Center for Law and Justice ("ACLJ") is a national, nonprofit pro-life, pro-family and religious liberties organization. The ACLJ works to preserve, protect, and promote religious liberty through education and legal defense.

The Family Life Project of the ACLJ ("Family Life Project") has been organized to focus on the family as the primary social and religious institution of a just society. The Project defends families against efforts to undermine their sovereignty, nature and importance, and to supporting and encouraging all elements in society to work together toward the creation and sustenance of a social order that supports the important work of families: rearing children.

This appeal addresses the serious problem of indecent images and messages readily available to minor children through various electronic communications media, in particular, through computer networks, such as the Internet, and similar and related computer bulletin board services and on-line information systems. The Communications Decency Act ("CDA") is designed to regulate indecent transmissions of electronic images and texts in order to insure that such indecent materials are not available to minor children. The mechanisms of the CDA are important means of protecting children. The proper resolution of this case is a matter of substantial organizational concern to the Family Life Project because of its commitment to families.

The CDA is an essential tool to protect children. It preserves to parents their right to have all the advantages the future holds in online computer networking without requiring that parents risk the exposure of minor children to indecent —

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*. The parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

patently offensive depictions or descriptions of sexual or excretory activities or organs — communications. The Project endorses the views expressed by Senator J. James Exon:

> Almighty God, Lord of all life, we praise You for the advancements in computerized communications that we enjoy in our time. Sadly, however, there are those who are littering this information super-highway with obscene, indecent, and destructive pornography. Virtual but virtueless reality is projected in the most twisted, sick misuse of sexuality. Violent people with sexual pathology are able to stalk and harass the innocent. Cyber solicitation of teenagers reveals the dark side of online victimization. Lord, we are profoundly concerned about the impact of this on our children. We have learned from careful study how children can become addicted to pornography at an early age. Their understanding and appreciation of Your gift of sexuality can be denigrated and eventually debilitated. Pornography disallowed in print and the mail is now readily available to young children who learn how to use the computer.
>
> Oh God, help us care for our children. Give us wisdom to create regulations that will protect the innocent. In times past, You have used the Senate to deal with problems of air and water pollution, and the misuse of our natural resources. Lord, give us courage to balance our reverence for freedom of speech with responsibility for what is said and depicted.
>
> Now, guide the Senators when they consider ways of controlling the pollution of computer communications and how to preserve one of our greatest resources: The minds of our children and the future and moral strength of our Nation. Amen.

141 CONG. REC. S8329 (daily ed. June 14, 1995) (quoting Senate Chaplain Lloyd Ogilvie).

SUMMARY OF ARGUMENT

A computer with a modem for telecommunications is truly an eye on the world. As the American Library Association said:

> the Internet serves as the communications medium for literally tens of thousands of global conversations, political debates, and social dialogues. [O]n the Internet, one can view the full text of the Bible, all of the works of Shakespeare, and numberous other classic works of literature. One can browse through paintings from museums around the world, or view in close-up detail the ceiling of the Sistine Chapel, or see the latest photographs trasmitted by the Jupiter space probe. One can even hear pieces of music or view clips of movies and videos over the Internet.

Complaint at ¶ 63, in *ALA, et al. v. United States Dep't of Justice, et al.*, No. 96-1458 (E.D.Pa. 1996).[1] Given that capacity, a computer with a modem for accessing the Internet is understandably considered a great good. No wonder educators recommend equipping students with the means to make use of that good.[2]

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1. The lead case below was *ACLU, et. al. v. Janet Reno*, No. 96-963 (E.D.Pa. 1996).

2. *See Statement Regarding Pornography on the Internet* in "Cyberporn and Children: The Scope of the Problem, The State of the Technology, And The Need for Congressional Action: Hearings on S.892 Before the Committee on the Judiciary" 104th Cong., 1st Sess. (July 24, 1995). The written

Suppose, however, that this great good was used for nefarious purposes. In the months leading up to the enactment of the CDA,[3] Congress confronted substantial evidence that computers, modems, computer networks and the Internet were being used to communicate obscene and indecent messages and images. Having apprised itself of the pervasiveness of indecency purveyed through computer communications, Congress enacted the CDA. Congress crafted the CDA to insure that, while adults remained free to create, view, read and exchange indecent computer communications, minor children would be shielded from such indecency. *See* Argument I, *infra*.

The Appellees argued below that the CDA is not the least restrictive means by which children may be protected from exposure to indecent online communication. Congress collected and considered substantial evidence, however, that current approaches were inadequate to prevent indecent communications to, and with, minor children. Market forces have reposed all responsibility for screening out indecent communications on those who receive such communications, even unwillingly or unintentionally. "Parental control" features of the online computer services (such as America Online, Prodigy, and Compuserve) and software filtering programs (such as NetNanny, SurfWatch and CYBERsitter), have not worked with sufficient effect to secure the government interest

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statements of the witnesses, and a transcript of the hearing are available in the office of the Senate Judiciary Committee.

3. The Communications Decency Act of 1996 was enacted as Title V of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (104th Cong., 2nd Sess., Feb. 6, 1996). Hereinafter the Communications Decency Act is referred to as "the CDA."

in protecting minor children from exposure to indecent communications. *See* Argument II, *infra*.

The CDA survives facial constitutional challenge. It does not ban all indecent computer communications; it only requires those who originate such communications to take responsibility for their availability to minor children. The CDA employs the least restrictive means to limit the accessibility of such materials to children, while leaving in place the opportunity to receive indecent communications and to communicate indecently for those adults who wished to do so. The CDA survives scrutiny of the sort employed by this Court in *Sable Communications v. FCC*, 492 U.S. 115 (1989); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. ___, 135 L.Ed.2d 888 (1996). *See* Argument III, *infra*.

ARGUMENT

I. Congress Was Presented Substantial Evidence Of A Serious Problem Of Indecent Images and Messages Online

On several occasions leading up to the enactment of the CDA, Congress was confronted by evidence that cyberspace--that electronic medium of communications existing in millions of computers, thousands of networks and hundreds of telephone systems--had become the Love Canal of the 1990s. Despite the best and brightest hopes, for good, for progress, for innovation, which inhere to the Internet, to the subordinate components of the Internet, and to other modes of online communication, what Congress discovered was an unrelenting effluent of the perverse, the indecent, the putrescent.

The evidence presented to Congress showed that indecency

and obscenity abounds in the online world. Seamy and unseemly depictions pervade: in graphic image files, in e-mail text messages, and in instantaneous online conversations. For over a year before the CDA was enacted, evidence of the problem of online indecency accumulated in the CONGRESSIONAL RECORD.

On July 26, 1994, Senator J. James Exon offered an amendment, No. 2404, to the Telecommunications Act of 1994. 140 CONG. REC. S9745 (daily ed. July 26, 1994). Sen. Exon stated that the purpose of his amendment was to "help assure that the information superhighway does not turn into a red light district [and to] help protect children from being exposed to obscene, lewd, or indecent messages." *Id.* at S.9746. To buttress his proposal and validate his concern, Sen. Exon caused to be included in the Congressional Record an article from the July 12, 1994 edition of the Los Angeles Times entitled, "Info Superhighway Veers into Pornographic Ditch." *Id.* That article, in turn, reports on a computer security breach at Lawrence Livermore National Laboratory in which computer hackers, including a Livermore employee, used Livermore computers to store and distribute pornography. *Id.* Sen. Exon's remarks marked the beginning of a trail of evidence about online obscenity and indecency.

On June 9, 1995, Sen. Exon spoke in conjunction with an amendment he was submitting for the consideration of the Senate. 141 CONG. REC. S8087-91 (daily ed. June 9, 1995). On that occasion, Sen. Exon presented the now-famous "blue book," which was simply a "sample of what is available" "on the computer, on the information superhighway[.]" 141 CONG. REC. at S.8089. That "blue" book provided a quick and shocking education to members of the Senate about the lewd

and lascivious topics of discussion and subjects of images available free of charge online.[4]

Sen. Exon explained how commercial pornography enterprises used the Internet to boost sales:

> What do these entrepreneurs over here do, Mr. President? What they do is to use the free access, without charge advertising with the best of some of their pornographic, obscene material, and they put it over here on the Internet with their printing press. ... When ... the money-making pornographers enter the free system of advertising, you do not even have to pay the price of going in and sitting down in a seat at a movie theater. What they do is take the best [sic] and most enticing pictures of whatever they want to sell that particular day or that particular week and they enter it over here on the Internet. They are posted on the bulletin board. And those are the ones, those are the pictures, those are the articles that are freely, without charge, accessible to very young children and to anyone else who wants to see them.

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4. Those topics included:

> Multimedia erotica; erotica fetish; nude celebrities; pictures black, erotic females; pictures boys; pictures celebrities; pictures children; pictures erotic children; pictures erotica; pictures erotica amateur; pictures erotica amateur females; pictures erotica amateur males; erotica animal; erotica auto; erotica bestiality; ... bestiality, hamster, duct tape; ... erotica black females; erotica black males; erotica blondes; erotica bondage; erotica breasts. ... Erotica cartoons; erotica children; erotica female; erotica female, anal; erotica fetish; erotica fury; erotica gay men; erotica male; erotica male, anal; erotica Oriental; erotica porn star.

141 CONG. REC. at S8089.

141 CONG. REC. at S8090.

That day Sen. Exon also caused two articles to be printed in the Congressional Record. 141 CONG. REC. at S.8091. One article, "Police Cruise Information Highway," originally appeared in the June 8, 1995, edition of the Omaha World-Herald. The article reports,

> [p]olice in Fresno, Calif[ornia], have a quick and dirty way to show parents how easily their children find sexually explicit material over computers: [t]hey bring parents in for show and tell. Surfing the Internet, police have unearthed sexually graphic conversations, photographs and X-rated movie clips, complete with audio.

141 CONG. REC. at S.8091.

On June 14, 1995, again relying on the "blue book," Sen. Exon addressed the nature of materials available for free through the Internet.

> [I]t is no exaggeration to say that the most disgusting, repulsive pornography is only a few clicks away from any child with a computer. I am not talking just about Playboy and Penthouse magazines. By comparison, those magazines pale in offensiveness with the other things that are readily available. I am talking about the most hardcore, perverse types of pornography, photos, and stories featuring torture, child abuse, and bestiality. These images and stories and conversations are all available in public spaces free of charge.

141 CONG. REC. at S8330 (daily ed. June 14, 1995).

On June 26, 1995, Senator Charles Grassley spoke in support of his legislation, "Protection of Children from Computer Pornography Act of 1995." 141 CONG. REC. at 9017

(daily ed. June 26, 1995). Sen. Grassley spoke to "the availability and the nature of cyberporn." *Id.* He informed the Senate of a Carnegie Mellon University study of visual images available on the Internet:

> [o]f 900,000 images, 83.5 percent of all computerized photographs available on the Internet are pornographic. ... There is a flood of vile pornography, and we must act to stem this growing tide ....

141 CONG. REC. at S9017.

Sen. Grassley also submitted into the Congressional Record two articles detailing the problem.

The first article, "An Electronic Sink of Depravity," first appeared in the American Spectator on February 4, 1995. Through this article, Sen. Grassley placed before the Senate evidence of electronic narratives more grotesque than almost the mind could contemplate (all readily available on the Internet). *Id.* These narratives included particularly disturbing ones, relating stories of torture-murders of little children:

> One is a six-year old boy named Christopher, who, among other indignities, suffers a castration — reported in loving detail — before being shot. The other is a girl named Karen, who is seven years old and is raped repeatedly by no fewer than nine men, before having her nipples cut off and her throat slashed.

141 CONG. REC. at S9018. Congress must have been pained by the information put in the record by Sen. Grassley. No doubt many were motivated to support regulation of obscenity and indecency online because they learned, as Sen. Grassley hoped, that, in the online world, works of electro-fiction describe "fathers sodomizing their three-year-old daughters ... mothers

performing fellatio on their prepubescent sons ... girls coupling with horses ... the giving of enemas to child virgins[.]" *Id.*

Sen. Grassley's second submission was a series of articles related to cyberporn that appeared in Time Magazine in June, 1995. 141 CONG. REC. at S9019-21. From those articles, members of Congress learned how online services are used to distribute graphic images of bizarre sex even to cybervisitors who are not seeking out smutty sex and scatologica.[5]

On July 24, 1995, the Senate Judiciary Committee conducted a hearing, "Cyberporn and Children: The Scope of the Problem, The State of the Technology and the Need for Congressional Action."[6] The hearing was conducted in

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5. For example, the article reports about an incident involving a ten-year old participating in a "chat room" offered by America Online for children ("the Treehouse"):

> [The] [t]en-year-old ..., a student at the Dalton School in New York City who likes to hang out with other kids in the Treehouse chat room on America Online, got E-mail from a stranger that contained a mysterious file with instructions for how to download it. He followed the instructions, and then he called his mom. When [his mother] opened the file, the computer screen filled with 10 thumbnail-size pictures showing couples engaged in various acts of sodomy, heterosexual intercourse and lesbian sex.

141 CONG. REC. at S9019-20.

6. The witness list for the hearing and copies of the written submissions of the witnesses are available through the Senate Judiciary Committee. The hearing transcript and submissions will be published as "Cyberporn and Children: The Scope of the Problem, The State of the Technology, And The Need for Congressional Action: Hearings on S.892 Before the Committee on the Judiciary" 104th Cong., 1st Sess. References to the prepared statements of the witnesses at the hearing are references to copies of those statements, obtained from the Judiciary Committee. Hereinafter, reference will be made to those prepared statements as "Cyberporn Hearing Statements."

connection with the legislation introduced by Senator Grassley the previous month (S. 892). The testimony during the "Cyberporn and Children" hearing further evinced the need for congressional action to address dangers to children from online indecency and obscenity.

One parent, Susan T. Elliott, M.D., recounted her family's experience with online pornography received through America Online.[7] Dr. Elliot explained that "[a] respected teacher suggested that they might benefit from information sharing on the Internet." *Id.* On that recommendation, the Elliot family logged onto America Online, a service choice influenced by the apparent ubiquity of "promotional discs from" that service. *Id.*

Although Dr. Elliot supervised much of her sons' online activities, she was not present when her boys "ventured into the more exciting realm of ... 'private' chat rooms." *Id.* While the Elliot children visited these racy, online speak-easies, "they were offered 'pictures' by other participants[and t]hey accepted a few of these, as did their classmates." *Id.*

What the children received when they downloaded the "pictures" were depictions of "hard core pornography in full color . . . ." *Id.* The Elliots would never have discovered this electro-pornography except that her husband "noted that the memory of [their] computer was rapidly filling up." *Id.* Clearing memory, the Elliots opened up a "'trash' file and found the graphics in question. They portrayed varying numbers of humans and animals engaged in a horrifying gamut of sexual

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7. *See Statement Regarding Pornography on the Internet* in "Cyberporn Hearing Statements."

activities. The pictures were lewd and obscene by any standards." *Id.*

The testimony of Dr. Elliot did not stand alone.[8] The Elliots experienced the problem of unsolicited invitations to obtain "pictures." But others who testified experienced or observed even more ominous predatory behavior.

Donelle Gruff testified that while logged on one computer bulletin board system (BBS), a cybervisitor using the name "Bill" logged onto the online conference she was in and invited everyone to call his BBS.[9] What Donelle got when she signed onto Bill's BBS was more than she wanted: after "a couple of days he started asking me personal questions" such as "what bra size do I wear" and "would I blow him[?]" *Id.* Donelle signed off Bill's BBS and returned to the one where she first learned of Bill's BBS. *Id.*

Bill immediately followed Donelle, electronically, to the other BBS, where he "kept telling [her] he was going to come

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8. Nor did the evidence received by Congress at that hearing, or otherwise, show that such predatory behavior was limited to efforts to affect young men. Another mother testified about an incident involving her daughter and her daughter's friends:

> Early this summer, my thirteen-year old daughter went to her friend's house ... to play on the computer. They were in the neighborhood; they were properly supervised; and I knew they were safe. It was shocking to discover later what they had experienced that afternoon.
>
> The girls were in a teenage chatroom on America Online, and were propositioned for "cybersex". Initially, they thought it was funny, giggling as you'd expect thirteen-year olds would, but as the requests became raunchier, they were frightened.

See Child Pornography on the Internet in "Cyberporn Hearing Testimony."

9. *See* "Statement of Donelle Gruff" in Cyberporn Hearing Statements.

to [her] house." *Id.* Late that night, Bill showed up at Donelle's house. *Id.* Over the next two days, Bill returned to her house at least twice, even though police had been called to the scene. *Id.* On the weekend, Bill followed Donelle for several hours while she was with friends at a bowling alley. *Id.* Later, he tried to manipulate Donelle's computer electronically, including an attempt to force download pornographic pictures, one of which was transmitted to Donelle's computer and subsequently turned over to police. *Id.*

In the testimony of Donelle Gruff, Congress confronted evidence of indecent electronic instantaneous messages (soliciting her participation in sex acts), with electronic and electronically-assisted stalking, and with indecent graphic images being transmitted to unwilling recipients. Another witness documented the nonchalant approach of one online service to the problem of pervasive indecency in instantaneous online communications.

Barry F. Crimmins purchased a computer and signed onto America Online.[10] Eventually, because he was an adult survivor of childhood sexual abuse and had heard of America Online's chatrooms for adult survivors, he took advantage of America Online's "People Connection," through which the chatrooms are entered for instantaneous online conversation. *Id.* at 4. As Crimmins reviewed a list of chatroom names, he discovered

> numerous atrocious rooms. Many were obviously created by, and for, pedophiles. There were rooms promoting rape, incest, the exchange of child pornography, hate crimes, and every possible, and in some cases impossible,

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10. *See Testimony of Barry F. Crimmins* in "Cyberporn Hearing Statements."

> sexual activity. ... The first time [he] found the Abuse Survivors' room, it was located between a room called "DadsNDaughtrs" and another entitled "lilboypix."

Id. at 5.

Crimmins testified that he had "been sent over a thousand pornographic photographs of children via" America Online. *Id.* Crimmins testified about the many chatrooms in which online indecency is concentrated on America Online.[11]

Believing that America Online ought to take responsibility for the things that occur within its cyberspace, Crimmins engaged in a long effort of correspondence seeking to obtain action by America Online to minimize or eliminate the pervasive pedophillic pornography online. *Id.* at 9-11, 13-21. Ultimately Crimmins found America Online indolent and unresponsive. He summarized his feelings thus: "I am here to tell the American people that not only are their children unsafe on AOL, their children are unsafe because of it." *Id.* at 11.

While considering the CDA and Sen. Grassley's legislation, Congress had before it clear evidence that indecent and obscene online communications were like crude pollutants, were causing or threatening to cause real injury to minor children and to unwitting adults. The facts put before Congress grew

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11. Crimmins testified about rooms such as "Nudist families," "Incest is best," "Have hot stepdaughter," *id.* at 6-7, "Hot4 auntie[,]" [sic] "boys in undies pics[,]" "Rape fantasy[,]" "hairless little vulvas[,]" "found pics of sis[,]" "dremz of little girls[,]" "teen masturbation[,]" "Likes em under 12[,]" "girls underwear pics wntd[,]" "teen incest stories[,]" "My sis caught mechild pooorn[,]" and "Dads4 sons incest[,]" *id.* at 22. In such rooms, Crimmins testified, "child pornography is exchanged, and incest is ... celebrated." "Cyberporn Hearing Statements" at 7.

irrebuttably to proof that the Internet, the online services, and the smaller computer bulletin boards were being used to facilitate a sleazy traffic in crude ruminations, dirty pictures, ominous stalkings, and promiscuous proposals. What remained to be done, and what is discussed below, was to determine whether the marketplace had provided an adequate response to the problem identified by Congress, and to craft an appropriate solution to the problem if necessary.

II. Less Restrictive Means Failed To Address Adequately The Problem Of Indecent Electronic Communications

The ACLU and the ALA have both argued that other means, short of the restrictions on indecent communications contained in the CDA, evince the principle that less restrictive alternatives to the CDA existed. For example, the ALA asserted:

> The online medium offers the recipients of information a degree of control unmatched in any other medium. Not only can users affirmatively select the content of materials they view based on the subject matter of the particular service or the information contained in the headline or subject line, but there are also numerous -- and expanding -- methods for users to screen and block incoming materials they choose not to receive.[12]

Of course there are electronic prophylactics to online indecency. Among these are the "parental control" features built into such online services as America Online, Compuserve and Prodigy.[13]

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12. ALA's Memorandum in support of Preliminary Injunction at 21.

13. *See* Declaration of Sheila A. Burke at ¶¶ 10-13 (Exhibit 8 in support of the ALA's Motion for a Preliminary Injunction).

The "parental control" features *may be used* to:

> 1) block access to all newsgroups on the Internet, 2) block access to a specific newsgroup by entering a specific Internet address, 3)block access to all Internet newsgroups not listed in the AOL index, 4) block access to newsgroups that have ... photographs and sound recordings, and 5) restrict access to newsgroups that contain a particular string of characters, such as "sex" or "nudity," in the Internet addresses.

Id.

There are also various computer software packages *that may be used* to restrict children's access to indecent materials. One popular package, SurfWatch

> is automatically activated when the computer is started, and can only be deactivated with the parent's private password. When a user logs on to the Internet, SurfWatch cross-checks every attempt to access Usenet newsgroups, World Wide Web, gopher and ftp sites, or Internet Relay Chat (IRC) sessions against a list of sites known to contain sexually explicit material. In addition, SurfWatch uses a proprietary pattern recognition technology which blocks access to sites which contain certain words or word strings in their addresses. ... If a user attempts to access a site that is contained on the SurfWatch blocked site list, or a site containing certain key words or phrases, the user is prevented from accessing the site and receives a message indicating the site has been "Blocked By SurfWatch."[14]

14. *See* Declaration of Bill Duvall at ¶¶ 13-14 (Exhibit 14 in support of ALA Plaintiffs' Motion for Preliminary Injunction).

Both approaches described above, as with all other methods of preventing exposure of children to indecent online communications, share two defects. First, they are not sufficient to accomplish the governmental purpose of preventing exposure of children to indecent materials online. Second, they all place the burden of failure on recipients of indecency rather than on creators and transmitters of indecency.

Prior to enacting the CDA, Congress acquired evidence that, even with such prophylactics in place, minor children were being exposed to online indecency. *See* Argument I, *supra*. Congress had the famous "blue book" in front of it; Congress was informed of incidents such as the unsolicited transmission of graphic sex pictures to Anders Urmacher, the Elliot children's dabbling with very dirty pictures, the stalking of Donelle Gruff, the insouciant attitude of America Online to the problems identified by Barry Crimmins.

Also before enactment of the CDA, Congress had been apprised of the prophylactic methods described above. For example, one America Online executive, William Burrington, Assistant General Counsel and Director of Government Affairs, testified at the Cyberporn Hearing.[15] In his written testimony, Mr. Burrington explained the operation of parental controls provided by online services, such as America Online, and also explained about the availability and utility of SurfWatch and other software filters. *Id.* at 8-11.

Congress was aware of the prophylactic methods available for screening online indecency, and that exposure of minor children to online indecency continued to be a problem. It was

15. *See Written Testimony of William W. Burrington* in "Cyberporn Hearing Statements."

reasonable, therefore, for Congress to conclude that the prophylactic methods provided by private market forces were insufficient to meet the needs it had identified. Congress reasoned that the only way to effectively protect minor children from being exposed to online indecency was to shift responsibility from minor children and their parents to those whose conduct created the risk of exposure.

Some may find it inconvenient to guard their language while children are around. Others may suffer physical or psychological defects that strip them of the capacity to choose their words with care. But Congress was entitled to conclude from the evidence that prophylactic methods had failed to accomplish the goal of protecting children — that the market had failed.

The commercial entities responsible for these prophylactic approaches readily acknowledge that their products or approaches to filtering indecency are deficient.[16] For example, Bill Duvall, the Chief Executive Officer of SurfWatch Software, Inc., explained that SurfWatch has to be regularly updated (something which his company will do for a fee) "because the number of sites on the Internet containing sexually explicit material is constantly changing ...."[17] In Duvall's view,

16. Access providers acting like common carriers, "solely ... providing access or connection to or from a facility, system or network under [its] control," are not liable for the "transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection" involving indecent material. *See* CDA § 502(e)(1).

17. *See* Declaration of Bill Duvall ¶ 16 (Exhibit 14 in support of the ALA Plaintiffs' Motion for Preliminary Injunction); *see also* Declaration of Nigel

"SurfWatch is a highly effective tool that can enable parents to better protect their children from objectionable material on the Internet." *Id.* at ¶ 22. But Duvall's understanding of "highly effective" is insightful:

> From our estimates, SurfWatch blocks 90 - 95 % of readily accessible sexually explicit sites on the Internet. This estimate is based on the assumption that most sites on the Internet containing sexually explicit material have been identified by our team of "net surfers" and added to the blocked site list, or contain key words in the sites address which are blocked by our pattern recognition technology.

Id. at ¶ 23.

Mr. Duvall's conclusion that SurfWatch was "a highly effective tool" must be tempered by his candid use of terms like "estimates" and "assumption." SurfWatch proceeds from a working hypothesis that "a substantial majority of sexually explicit Internet sites can be identified by one of several common key words in the address (e.g., "sex", "erotic", etc.)." *Id.* But that working hypothesis is not a settled rule. For example, to the extent that sponsors of Internet sites seek to avoid detection by SurfWatch's pattern recognition technology or other filtering software, the filters become ineffective.

Congress had evidence of a problem of online indecency. Congress knew that the indecency flourished even when the nongovernmental prophylactics were applied to the problem. Consequently, Congress correctly concluded that such less restrictive means would be ineffective. That conclusion fully

R. Spicer ¶¶ 24-26 (Exhibit 31 in support of the ALA Plaintiffs' Motion for Preliminary Injunction) (explaining the purposes and mechanics of "Cyber Patrol," another filtering software program).

justified Congress' decision to address the problems of online indecency and obscenity through legislation.[18]

III. The CDA Is Facially Constitutional

A. The CDA's Regulation of Indecent Communications Is Not Vague or Overbroad

Congress enacted the CDA as Title V of the Telecommunications Act of 1996. The CDA requires creators and distributors of indecent materials to take reasonable steps to insure that such materials are not displayed to, or communicated to, minor children. The CDA accomplishes this purpose through two key provisions.

Section 502(1) of the CDA prohibits knowing use of a "telecommunications device" to make or create and "initiate[] the transmission of, any comment, request, suggestion, proposal, image, or other communication which is ... indecent, knowing that the recipient of the communication is under 18 years of age." Section 502(2) of the CDA prohibits knowing use of an "interactive computer service" to make "patently offensive" communications to a specific person or persons under eighteen yeas of age. That section also prohibits knowing use of an "interactive computer service" to "display" "in a manner available to" a person under eighteen years of age

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18. In *Paris Adult Theater v. Slaton*, 413 U.S. 39, 63 (1973), this Court stated:

> Nothing in the Constitution prohibits [government] from reaching [the conclusion that pornography is detrimental to society] and acting on it legislatively simply because there is no conclusive evidence or empirical data. The congressional record developed prior to the enactment of the CDA more than sufficiently supports the CDA's special protection of children.

"patently offensive" communications.[19]

Key to the effective operation and enforcement of these provisions is the meaning of the term "indecency." The legislative history is clear on this point. Congress adopted the meaning of "indecency" given to it in federal court decisions such as *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See* H.R. REP. NO. 458, 104th Cong., 2nd Sess. 188 (1996).[20] The Conference Report states:

> The conferees intend that *the term indecency ... has the same meaning as established in FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and Sable Communications of California, Inc. v. FCC, 492 U.S. 115

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19. In pertinent part, section 502(2) of the CDA provides:

> (d) Whoever-
>
> (1) in interstate or foreign communications knowingly-
>
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
>
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
>
> any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
>
> (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,
>
> shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

20. Hereinafter referred to as "Conference Report."

(1989). These cases clearly establish the principle that the federal government has a compelling interest in shielding minors from indecency. Moreover, these cases firmly establish the principle that the indecency standard is fully consistent with the Constitution and specifically limited in its reach so that the term is not unconstitutionally vague.

Conference Report at 188 (emphasis added).

A review of the decisions shows that, in legislative and administrative uses of the term "indecency," although some variations exist, the essence of its meaning is constant. "Indecency" means "patently offensive descriptions of sexual and excretory activities."

As it considered the meaning of "indecency," Congress considered, but rejected, the "harmful to minors" standard. *See* Conference Report at 189 (citing *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968)). The "harmful to minors" standard was proposed by some who urged the need for such a standard to protect "material with 'serious literary, artistic, political, and scientific value[.]'" Conference Report at 189. In Congress' view, however, use of "harmful to minors" standard was not necessary to protect "'serious literary, artistic, political, and scientific value,'" because material could not be determined to be "patently offensive" "without a consideration of the context" and without showing both "the intention to be patently offensive," and "a patently offensive result." *Id.* (citations omitted).

By adopting the indecency standard from *Pacifica* and *Sable*, Congress showed its intention not to have treated as indecent materials that have "serious redeeming value[,]" that are "intended to edify and educate," that are not designed "to

offend." *Id.* Further, the indecency standard was upheld in *Denver Area*, 518 U.S. ___, 135 L.Ed.2d at 902, where this Court noted that the need to protect children from exposure to patently offensive sex-related material was an "extremely important justification."

B. Indecent Communications Do Not Enjoy Absolute First Amendment Privilege And May Be Regulated By Congress

While this Court has said that "[s]exual expression which is indecent but not obscene is protected by the First Amendment[,]" *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), it has never held that indecent communications enjoy an absolute First Amendment privilege, or that governments are utterly powerless to respond to the problems associated with indecency. Rather, this Court has said:

> [t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.[21]

Further, the interest that prompted Congress to act, the protection of children, has been recognized by this Court as one which is compelling:

> [w]e have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult

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21. *Sable*, 492 U.S. at 126; *Denver Area*, 135 L.Ed.2d at 902.

standards.[22]

Our Nation's duty to protect children them from harm and equip them for the future, has been recognized as a paramount obligation. With respect to the "dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene . . . ," this Court has stated, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 753, 758 (1982). Of course, here the indecent images, messages and communications have not *necessarily* been produced with the involvement of children. The threat to children from such indecent materials lies, not in its making, but in its immediacy and its ubiquity.

Technological advances in communications — telephone services, computer bulletin boards, commercial online services, and the Internet — have galloped ahead of governmental regulation. These fast-paced, evolving technologies have been used by those who have materials to communicate that are indecent. Children, at least some of whom are not looking for provocative electronic conversations or salacious portrayals of sexual or excretory activities, have been given ready access to indecent communications.

In response to the serious problem outlined in Argument I, *supra*, Congress did not go overboard and prohibit indecency online. Given *Sable*, Congress knew that a sweeping prohibition would likely have been struck down judicially. Rather than prohibit adults from creating, using, viewing and exchanging indecent materials online, Congress merely shifted the burden of responsibility for indecent communications from

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22. *Sable*, 492 U.S. at 126.

recipients to its creators and distributors.

In *Sable*, this Court struck down a ban on indecent interstate commercial telephone communications, 492 U.S. at 126-31, while affirming a ban on obscene interstate commercial telephone communications, 492 U.S. at 124-26. The CDA, although also targeted at indecency, is quite different in character from the total ban struck in *Sable*. Rather, it follows the permissible form of regulation upheld in *Denver Area*.

In essence, the CDA imposes on creators of indecent communications the same sorts of gatekeeper responsibilities that this Court suggested in *Sable* would both serve the important government interests at stake and avoid unconstitutional restriction on indecent, but protected, communications among adults. Examination of pertinent sections of the CDA shows that it is neither a sweeping ban nor more restrictive of indecent communications than necessary.

Congress did not ban all online indecency. Thus, *Sable* is inapposite. In *Sable*, this Court likened a flat ban on indecent interstate telecommunications to the constitutional equivalent of "burn[ing] the house to roast the pig," *Sable*, 492 U.S. at 127 (citation omitted). Here Congress concluded that it was time to remove from the parlor a few pigs to make room for children who ought not to have been relegated to the pig's pen.

C. The CDA's Regulation Of Indecent Communications Is Facially Constitutional Under *Pacifica*, *Sable*, and *Denver Area*

Congress has not violated the rights of the ACLU or the ALA by enacting the CDA. This Court has approved a system of regulation that does not ban indecent communications but restricts the time, place and manner of their communication so

as to protect minors from exposure to them.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court upheld a Federal Communications Commission order that the broadcast of a George Carlin monologue entitled, "Filthy Words," "'was indecent and prohibited by 18 USC [§] 1464.'" 438 U.S. at 732 (citation omitted). What this Court had to say about "indecent" radio broadcasting, and regulatory restrictions thereof, provides valuable guidance here. Unlike *Sable*, *Pacifica Foundation* addresses regulation of indecency, not its complete prohibition. In that respect, the reasoning in *Pacifica Foundation* is directed to analogous concerns.

At issue in *Pacifica Foundation*, Title 18 U.S.C. § 1464 prohibits the use of "any obscene, indecent, or profane language by means of radio communication." The FCC concluded that "the language used in the Carlin monologue [w]as 'patently offensive,' though not necessarily obscene ...." 438 U.S. at 731 (citation omitted). For the Commission, which was admittedly seeking to restrict the availability of such materials to children, the context of the broadcast of the monologue was key: it was "'broadcast at a time when children were undoubtedly in the audience ....'" 438 U.S. at 732 (citations omitted). After its order issued, the Commission clarified its order, stating it "'never intended to place an *absolute prohibition* on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.'" 438 U.S. at 733 (citations omitted, emphasis added).

In *Pacifica*, this Court undertook the tasks of defining "indecent," 438 U.S. at 739-41, and of weighing the constitutionality of the Commission's judgment that "Filthy Words" was a prohibited broadcast of "indecent" language. In

this Court, Pacifica Foundation argued that the Commission had misunderstood the ban on radio broadcasting of "obscene, indecent, or profane" language. 438 U.S. at 739-40. Pacifica argued that the term "indecent" had the same meaning as the term "obscene." *Id.* In Pacifica's view, the absence of any prurient appeal in "Filthy Words" and the Commission's hesitance to declare the monologue obscene should have placed the monologue outside of the scope of the statutory ban on broadcasts of "obscene, indecent, or profane" language. *Id.*

This Court was not persuaded by Pacifica's arguments; the Court relied on the commonly accepted meaning and dictionary definition of "indecent." "[T]he normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." 438 U.S. at 740.[23]

Having arrived at its workable definition for "indecent," and concluding that "the content of Pacifica's broadcast was 'vulgar,' 'offensive,' and 'shocking[,]'" 438 U.S. at 747, this Court then considered the context of the broadcast "because content of that character is not entitled to absolute constitutional protection under all circumstances ...." *Id.* This Court has "long recognized that each medium of expression presents special First Amendment problems[,]" 438 U.S. at 748 (citation omitted). With respect to the broadcast of "Filthy Words," this Court reasoned that even though some quite offensive written

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23. To give content to "indecent," this Court looked to the dictionary:

> Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY ... b: not conforming to generally accepted standards of morality; ....

438 U.S. 740 n.14 (quoting Webster's Third New International Dictionary (1966)).

message "might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." 438 U.S. at 749. Although irony in an opinion of This Court can be an effective forensic device, Congress enacted the CDA to cure a real problem, not a rhetorical one.

In context, "Filthy Words" was patently offensive. In *Pacifica Foundation*, this Court found the FCC's conclusions, that the monologue was indecent and that its broadcast violated federal law, fully justified. Similarly, the indecent communications that are ubiquitous online fully justify Congress' decision to enact the CDA. The Act "does not by any means reduce adults to [communicating] only what is fit for children ...." 438 U.S. at 750 n.28 (citing *Butler v. Michigan*, 352 U.S. 380 (1957)). Instead, adults will continue to have available to them a panoply of indecent matter.

Just last Term, this Court upheld the indecency standard in *Denver Area*, 518 U.S. at ___, 135 L.Ed.2d at 902. In that case, cable operators could prohibit the broadcasting of indecent materials on leased access channels — channels which federal law required cable operators to reserve for commercial lease by unaffiliated third-parties — when the operator reasonably believed to describe or depict sexual or excretory activities or organs in a "patently offensive" manner. This Court explained that the problem Congress attacked in passage of section 10(c) of the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. § 532(h)) was

> remarkably similar to the problem addressed by the Federal Communications Commission in *Pacifica*, and the balance Congress struct is commensurate with the balance [it] approved there.

Denver Area, 518 U.S. at ___, 135 L.Ed.2d at 903. That balance considers the unique and pervasive presence of the service, and its easy access to children, with the desire of adults to obtain and have access to indecent materials. Where the desire of adults, however, for protected indecent material on the Internet can be met with identification and membership procedures among others, to the desired website, the regulations of the CDA are fully commensurate *Pacifica* and *Denver Area* and the First Amendment.

Enactment of the CDA does not mean that indecent electronic communications will become unavailable. Under the standard Congress chose for "indecency," the term is applicable only to those materials created with "the intention to be patently offensive," and which showed "a patently offensive result." *See* Conference Report at 189. All that the creators and users of online indecency must now do is either avoid communicating indecency to children or posting indecent materials where children can have access to them or avoid commerce in materials that are intentionally patently offensive and produce "a patently offensive result."

Online indecency has not been proscribed. It has been regulated because of our the need to protect children from it. The manner of regulation, permitting uses and exchanges of it among adults, is the least restrictive one available that will accomplish the important government purpose of protecting children. Inapposite appeals to the First Amendment cannot indecency from reasonable regulation. The CDA is constitutional on its face.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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